

MERC and the Open Meetings Act

HB 4772 of 2009 -proposed amendment to sec 3 of 1976 PA 267, MCL 15.263(7)

The Michigan Employment Relations Commission (MERC) is a quasi-judicial body whose primary function is to administer the Public Employment Relations Act (PERA). MERC operates similarly to the federal National Labor Relations Board. The Commission, with the assistance of the staff of the Bureau of Employment Relations and administrative law judges (ALJs) from the State Office of Administrative Hearings and Rules, adjudicates alleged statutory violations of labor law including: unfair labor practices, disputes over bargaining unit composition, and other issues related to public employee representation. MERC's decisions on unfair labor practices charges are made after an ALJ issues a recommended order. Commission decisions are appealed directly to the Michigan Court of Appeals.

Under Michigan's Open Meetings Act (OMA), MCL 15.261, *et. seq.*, MERC's review of ALJ decisions and recommended orders must be conducted at an open meeting. MERC is considered to be a "public body" under the OMA and, as such, it is subject to that law's requirement that Commission business must be conducted at a properly-noticed meeting that is open to the public.

Because the Commission is comprised of three members, two members constitute a quorum. Thus, when two Commissioners want to discuss the merits of a pending case, their discussions must take place in an open meeting convened in accordance with the OMA. This makes it extremely difficult for meaningful judicial deliberations to take place since Commissioners may discuss pending cases only when they are together at monthly meetings. This problem has been exacerbated by the fact that the three-member Commission is often comprised of members who live great distances from each other. Commissioners have only part-time appointments, and they typically do not work in MERC offices. This has resulted in protracted delays in the issuance of decisions - especially those of a complex nature - as the rationale behind a decision can be discussed only at a public meeting convened per the requirements of the OMA. Finally, compliance with the OMA has significantly interfered with the free discussion and exchange of ideas that should take place in quasi-judicial deliberations.

MERC deals with highly controversial and sensitive disputes. Labor law adjudications on issues such as a refusal to bargain or refusal to provide information require promptness in determinations - a goal that MERC simply cannot attain while under OMA requirements. Finally, MERC often follows NLRB precedent; yet, the NLRB is not subject to the requirement that its meetings be open to the public.

Section 3(7) of the Open Meetings Act exempts certain agencies from the Act's requirements when deliberating the merits of a case. Those agencies include the Worker's Compensation Appeal Board, the Employment Security Board of Review, the State Tenure Commission, and the Public Service Commission. Yet, MERC itself is not exempt even though its responsibilities run parallel to the exempt boards and agencies. Similar to MERC, these exempted agencies are quasi-judicial, neutral bodies charged with resolving issues between outside parties. In these cases, the State has no financial or regulatory interest in the outcome;

therefore, there is no compelling need for transparency in agency action. Further, any such need is outweighed by the interest in ensuring that candid discussion and deliberation take place when deliberating the merits of a pending case.

To correct an apparent oversight by the original drafters of the statute, we have proposed an amendment (HB 4772 of 2009) to the OMA to include MERC in the exceptions listed in the statute. The amendment provides that Section 3(7) of the Open Meetings Act that exempts certain public bodies when deliberating the merits of a case should also apply to the Employment Relations Commission. Significantly, even with this amendment, most MERC business will be conducted at an open meeting. MERC decisions will still be made at a public meeting; only deliberations on pending cases would be exempt.

Contact: Ruthanne Okun, Director
Bureau of Employment Relations/MERC
okunr@michigan.gov
(313) 456-3519
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